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No. 228

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GULF OIL CORPORATION,

Petitioner,

against

EDWARD LIEBERMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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GULF OIL CORPORATION,

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EDWARD LIEBERMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Gulf Oil Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 2, 1963, on which judgment rehearing was denied on April 29, 1963.

Citations to Opinion Below.

The opinion of the Court of Appeals is reported at 315 F. 2d 403, and is printed in the Appendix hereto, *infra*, pp. 1a-8a.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 2, 1963. A petition for a rehearing en banc was denied on April 29, 1963. Copies of the judgment and of the orders denying rehearing are set forth in the Appendix, *infra*, pp. 9a-13a.

The jurisdiction of the Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Whether the decision of this Court in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, compels a Court of Appeals to affirm an extension of time in which to appeal granted by a District Court, where there has not been any "showing of excusable neglect based on a failure of a party to learn of the entry of the judgment" required by Rule 73(a) of the Federal Rules of Civil Procedure.

Federal Rule Involved.

Rule 73(a) of the Federal Rules of Civil Procedure is the Rule involved. The relevant portion of the Rule 73(a) is:

> "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law . . . except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

Statement of the Case.

This action for malicious prosecution, wherein federal jurisdiction was based on diverse citizenship, was brought by respondent in the Southern District of New York against Gulf Oil Corporation, John Leivia and W. B. Edwards. An amended complaint on March 30, 1961 dropped the individual defendants Leivia and Edwards. After trial before Judge Sugarman and a jury, a verdict for Gulf was rendered on December 18, 1962, and the Clerk filed the judgment on that day. The judgment was entered on December 19, 1962, and notice thereof was mailed to plaintiff's attorneys.

Respondent concedes (Appendix, pp. 20a, 23a), and the Court below so found (Appendix, p. 2a), that respondent promptly learned of the entry of judgment.

The caption of the judgment erroneously contained the names of John Leivia and W. B. Edwards as defendants, and the body of the judgment erroneously stated that these defendants had been dropped from the action pursuant to the second amended complaint of November 7, 1962, rather than pursuant to the first amended complaint of March 30, 1961. On December 26, 1962, Judge Sugarman, pursuant to Rule 60(a), which relates to clerical mistakes, signed an order amending the judgment by striking from the caption the names of the individual defendants, and by striking from the body of the judgment the parenthetical clause as to when these defendants had been dropped from the action. This order was entered on December 27, 1962, and notice thereof was duly mailed to respondent's attorneys (Appendix, pp. 20a, 23a).

Respondent filed a notice of appeal on January 25, 1963, more than 30 days after entry of the judgment. On Febru-

ary 15, petitioner moved to dismiss the appeal as untimely. Thereupon respondent sought on February 18—60 days after the entry of judgment—and obtained from Judge Sugarman an extension of his time to appeal through that day. A notice of appeal was filed on the same day. Petitioner sought to dismiss both appeals: the first on the ground that it was untimely and the second on the ground that Judge Sugarman had no authority to extend respondent's time to appeal. The Court of Appeals granted petitioner's motion to dismiss the first appeal as being out of time. However, petitioner's motion to dismiss the second appeal was denied on the basis of the recent *per curiam* decision of this Court in the *Harris* case, 371 U. S. 215.

Reasons for Granting the Writ.

Circuit Judge Friendly, writing for the Court below, explicitly stated that the extension granted by the District Court would have been considered erroneous but for this Court's opinion in the *Harris* case. In his view, *Harris* "dictated" a different result and "constrained" the Court below to uphold the extension (Appendix, pp. 6a, 7a). Thus, the decision below, which is the first considered application of *Harris*, intentionally puts in issue the question whether the *Harris* decision requires that a Court of Appeals affirm any extension of time to appeal granted by a District Court whether or not the terms of Rule 73(a)—laying down jurisdictional requirements for appeals—are complied with. But in doing this Judge Friendly has misread *Harris*, with the result that the decision below both misapplies *Harris* and conflicts with decisions in other Circuits on the important matter of the time for appeal under the Federal Rules of Civil Procedure. Unless this Court grants certiorari and

corrects the misinterpretation below of *Harris*, the considered limitations which Rule 73(a) places on the granting of extensions of time for appeal will in effect disappear.

1. The misapplication of the *Harris* case below is readily apparent. Unlike the situation here, the petitioner in *Harris* appeared before the trial court within the 30-day period for appeal and requested that an extension of time be granted beyond the 30-day limit in order that he be able to contact the general counsel for his client to get instructions on whether to appeal. The extension was granted by the District Court and, relying upon that extension, the petitioner did not note his appeal until the end of the extended period—more than 30 days following the entry of judgment. Upon review, the Court of Appeals dismissed the appeal on the ground that the district judge had no basis for extending the 30-day limit because a showing of "excusable neglect based on a failure of a party to learn of the entry of the judgment" had not been made out in accordance with Rule 73(a).

This Court regarded the circumstances of *Harris* as "unique" in that the petitioner, having moved for an extension within the 30-day period, had failed to note a timely appeal solely because of his reliance on the extension granted by the district judge. This Court expressly failed to rule on the propriety of the district judge's extension of the time to appeal; it vacated the judgment of the Court of Appeals because of the "obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect'." In view of the hardship, this Court held that the district judge's finding of "excusable neglect" should be given "great deference by the reviewing court"

and ought not to have been set aside in view of the "unique circumstances" of that case.

Following *Harris*, the exceptions to the 30-day limitation of Rule 73(a) can be stated as follows:

> (a) Either before or after the 30-day limitation has elapsed, an appellant may move for an extension of time to appeal on a showing of "excusable neglect based on a failure of a party to learn of the entry of the judgment."
>
> (b) When a judge has granted such an extension within the 30-day period so that the appellant relied upon such extension in failing to note his appeal within 30 days, "great deference" shall be given to such extension by the reviewing court "whatever the proper result as an initial matter" may have been.

Neither of these guidelines as set forth in *Harris* can have any application to the situation presented by the instant case. Respondent made no showing below—and indeed, did not even claim—that he had failed to learn of the entry of the judgment. Thus the question of "excusable neglect" was never in issue. Nor is there any possibility that respondent was misled by Judge Sugarman's extension and thereby prevented from filing a timely appeal. The 30-day period for appeal had already expired at the time the extension was requested.

In short, then, this case simply does not present the "obvious great hardship" and the "unique circumstances" which were determinative in *Harris*. Respondent's failure to appeal during the 30-day period, while admittedly having knowledge of the entry of judgment, was at best the result either of a "careless omission" or a "failure to understand the law"—reasons which the Second Circuit itself

has held "do not excuse inaction." *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81 (1960).[1]

2. The decision of the Court below conflicts with the uniform interpretation of Rule 73(a) by other Circuits which, applying the plain language of the Rule, hold that "failure of a party to learn of the entry of the judgment" is the only acceptable basis for extending the time to appeal. *Watson* v. *Providence Washington Ins. Co.*, 201 F. 2d 736 (4th Cir., 1953); *Howard* v. *Local 74, Wood, Wire & Metal Lathers International*, 208 F. 2d 930 (7th Cir., 1953); *Edwards* v. *Doctors Hospital*, 242 F. 2d 888 (2nd Cir., 1957); *Knowles* v. *United States*, 260 F. 2d 852 (5th Cir., 1958).

---

[1] The only possible mistake under which respondent could have been operating was that the time for appeal ran from the corrected judgment of December 26 rather than the original judgment of December 18. However, the Court of Appeals below properly ruled on this issue that an amendment of a judgment of the sort involved here "does not toll the time within which review must be sought." *F.T.C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211 (1952). On this basis, the Court of Appeals dismissed the first appeal noted on January 25. Respondent has not cross-petitioned for *certiorari* from this final judgment of the Court below.

However, as a makeweight justification for upholding the extension, the Second Circuit suggested that respondent may have labored under the *misconception* that the December 26 amendment of the judgment was pursuant to Rule 59(e), rather than a clerical correction under Rule 60(a), and that the time for appeal therefore ran from the amendment as provided by Rule 73(a)—see Appendix, pp. 7a-8a. The short answer to this appellate guesswork is that respondent never suggested that he labored under any such misunderstanding in either of the affidavits he filed in the Courts below (see Appendix, pp. 20a, 23a, *infra*). Moreover, respondent could not have been confused. When a jury renders a verdict for a defendant and judgment is entered thereon, it is difficult to imagine what amendment could be made to that judgment other than correction of a "clerical mistake" as provided in Rule 60(a). Also, if this amendment had been pursuant to Rule 59(e), a motion would have had to be served and filed within 10 days after the judgment of December 18, but such a motion was not filed at any time. Finally, on January 2, while he still had half of his 30-day appeal period left, respondent learned from the Clerk of the District Court that the amendment merely struck the names of the individual defendants whom he had dropped as parties (Appendix, p. 24a).

And see also *Nichols-Morris Corp.* v. *Morris,* 279 F. 2d 81 (2nd Cir., 1960).

In *Howard,* the facts were very close to those in the case at bar. There, plaintiffs filed a notice of appeal 32 days after the entry of judgment. Thereafter, the district court granted plaintiffs' motion for leave to withdraw their notice of appeal previously filed and for an extension of time for filing another notice of appeal. The Court of Appeals for the Seventh Circuit dismissed the appeal on the ground that the order extending the time to appeal, pursuant to which a second notice of appeal had been filed, had been made without jurisdiction, saying:

> "... a lower court may not extend the statutory time for taking an appeal, except insofar as the statute itself empowers it to do so and an extension is permissible under Rule 73(a) on a showing of 'excusable neglect' only. No such showing was made here." (p. 933)

In *Knowles,* plaintiff sought to appeal from a judgment entered on December 20, 1957. She did not file her notice of appeal until February 19, 1958, which was one day late under Rule 73(a).[2] On the same day she applied for and obtained an extension of time to appeal to March 18, 1958. The Court of Appeals dismissed the appeal stating (at p. 854):

> "February 18th was the last day for the taking of the appeal by filing with the District Court a notice of appeal. The District Court had '* * * jurisdiction to extend the time for appeal only if a basis for that jurisdiction is found within the express provisions of Rule 73(a) * * *' The plaintiff did not allege or

[2] Rule 73(a) provides that when the United States is a party the time to appeal shall be 60, instead of 30, days from the entry of judgment.

> show, and does not claim, any 'excusable neglect based on a failure * * * to learn of the entry of the judgment' ".

These cases from other circuits have applied Rule 73(a) in accordance with its terms. The decision of the Court below does not. In view of the frequency with which questions relating to timeliness of appeals come before federal courts throughout the country, it is highly desirable that this Court determine which view is correct. The lower courts, and the bar generally, should be advised whether or not the principle of the *Harris* case is to be confined to the unique circumstances present there, or whether it was intended to overrule the consistent course of decision described above.

3. Rule 73(a) is an important rule, dealing with the vital matter of when litigation is at an end. For that purpose, it lays down clear limits on the time for appeal—an appeal must be taken within 30 days (60 days if the United States is involved) after the entry of judgment, and extensions may be granted for an additional 30 days, not just for "excusable neglect" alone, but only for "excusable neglect based on a failure of a party to learn of the entry of the judgment". Those limitations were deliberately and carefully chosen—see the Committee Note quoted in 7 Moore, *Federal Practice* (2d ed. 1955), pp. 3110-3113. They should be observed in a uniform fashion. They should not be ignored or judicially emasculated. Such was not the intention of this Court in the *Harris* case. But such is the result of the decision below, when it went out of its way to misread *Harris* as requiring that the extension of time

to appeal be upheld. This misinterpretation of *Harris* should be corrected before it spreads. Otherwise, extensions of time to appeal may be freely granted by the District Courts without regard to the considered requirements of the Rule and the policy of finality on which those requirements are based.

Since the error below is apparent, and since this case involves no factual dispute, nor any involved legal interpretations which will be clarified by briefs on the merits and oral argument, petitioner respectfully suggests that this case is suitable for summary reversal on the papers, which was the course followed in *Harris*.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted and the order denying the motion to dismiss the appeal filed on February 18, 1963, should be summarily reversed.

Respectfully submitted,

Leo T. Kissam,
Attorney for Petitioner.

Kissam & Halpin,
Edmond K. Leach,
Of Counsel.

APPENDIX

Opinion of the United States Court of Appeals, Dated April 2, 1963.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1962

(Motions argued March 11, 1963 Decided April 2, 1963)

Docket No. 28094

EDWARD LIEBERMAN,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant-Respondent.

Before:

MOORE, FRIENDLY and SMITH,
Circuit Judges.

Motions to dismiss appeals as untimely under F. R. Civ. Proc. 73(a). Motion to dismiss first appeal granted; motion to dismiss second appeal denied.

BERNARD TOMPKINS (TOMPKINS & LAUREN), New York, New York, for Plaintiff-Appellant.

LEO T. KISSAM (KISSAM & HALPIN), New York, New York, for Defendant-Respondent.

FRIENDLY, Circuit Judge.

This action for malicious prosecution, wherein federal jurisdiction was based on diverse citizenship, was brought

in the Southern District of New York against Gulf Oil Corporation, John Leivia, and W. B. Edwards. An amended complaint dropped the individual defendants. After trial before Judge Sugarman and a jury, a verdict for Gulf was rendered on December 18, 1962. The judge having denied all of plaintiff's motions with respect to the verdict, the Clerk on that day filed the judgment and mailed notice thereof to plaintiff's attorney; the judgment was entered on December 19.

The judgment was captioned "Edward Lieberman, Plaintiff, v. Gulf Oil Corporation, John Leivia and W. B. Edwards, Defendants." It recited: "The above-entitled action having come on regularly for trial before the Honorable Sidney Sugarman and a jury as to the defendant Gulf Oil Corporation (the remaining defendants having been dropped pursuant to the second amended complaint filed November 7, 1962) * * * and the jury having returned its verdict in favor of the defendant, it is ADJUDGED: The defendant Gulf Oil Corporation shall have judgment against the plaintiff Edward Lieberman." On December 26, 1962, apparently as the result of an oral request to the Clerk by Gulf's attorneys, Judge Sugarman signed an order stating that "Pursuant to Federal Rule of Civil Procedure 60 (a)," which relates to clerical mistakes, the judgment was amended by striking the names of Leivia and Edwards from the caption and the parenthetical clause from the body. The Clerk physically altered the judgment as directed and mailed plaintiff's attorney a notification that "There was entered on the docket *12-26-62* * * * an order *d* (judgment) *amended*"[1]; in fact the order was entered December 27. On December 28, in response to the notification, plaintiff's attorney went to the Clerk's office to see what the amendment was, but the amended judgment was not

[1] The italicized material was typewritten; the rest was a printed form.

yet in the file; on January 2, 1963, he telephoned the Clerk and learned "that the new order amended the judgment by striking" the names of the two individual defendants.

Plaintiff filed a notice of appeal on January 25, 1963—more than 30 days after the entry of the original judgment on December 19 but less than 30 days after the December 27 amendment. On February 15 defendant served notice of a motion to dismiss the appeal as untimely under F. R. Civ. Proc. 73(a), the first paragraph of which we quote in the margin.[2] Thereupon plaintiff sought and on February 18 obtained an order from Judge Sugarman extending his time to appeal through that day upon the basis of excusable neglect; a second notice of appeal was immediately filed. Defendant has moved to dismiss the first appeal as untimely and the second appeal on the ground that Judge Sugarman had no authority to extend plaintiff's time.

The entry of the order correcting a mistake in the judgment pursuant to Rule 60(a) did not start the time for

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[2] "(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or, granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

appeal running again. "[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211, 73 S. Ct. 245, 248, 97 L. Ed. 245 (1952); see also *Department of Banking* v. *Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254 (1942). It would be hard to think of a revision more immaterial than that here; indeed, we cannot imagine why it was sought. And Rule 73(a), in listing the types of motions which will terminate and start anew "the running of the time for appeal," significantly omits motions made pursuant to Rule 60(a)—the Rule clearly stated in the judge's order to be the basis for the amendment here. The January 25 notice of appeal was thus untimely.

If these motions had come before us a few months ago, we should likewise have thought the district court was without authority to extend appellant's time. This would not have been due to any doubt that the pardonable misunderstanding by appellant's attorney could be considered "excusable neglect," especially in view of the absence of any prejudice to the defendant from the short delay, but because F. R. Civ. Proc. 73(a), now codified in 28 U. S. C. § 2107, requires more than that. The showing must be of "excusable neglect *based on a failure of a party to learn of the entry of the judgment*"; and the background of this provision, reinforced by the contrast of the language with that in Rule 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect"), shows that the words we have italicized were put there deliberately.

The Federal Rules of Civil Procedure as originally adopted made no provision as to the time within which appeals to the courts of appeals were to be taken, although original Rule 6(b) expressly prohibited enlargement of "the period for taking an appeal as provided by law." In general a three-month period was provided in 43 Stat. 936, 940; shorter times had been established for appeals from various interlocutory orders and, by court rule, in

the District of Columbia. See 7 Moore, Federal Practice (2d ed. 1955), ¶ 73.09[1]. The provision now found in F. R. Civ. Proc. 73(a) was adopted in 1946 and stemmed from two sources. The basic one was a 1944 resolution of the Judicial Conference of Senior Circuit Judges, recommending to the Rules Committee "That in all civil cases, except where a shorter period may be provided by law and except those wherein the United States is a party, appeals shall be within thirty days after judgment or order denying motions affecting the judgment." See 7 Moore, *supra*, at 3110. The other was *Hill* v. *Hawes*, 320 U. S. 520, 64 S. Ct. 334, 88 L. Ed. 283 (1944), which had arisen under the rule of the Court of Appeals for the District of Columbia requiring an appeal to "be taken within 20 days after the * * * judgment * * * complained of shall have been made or pronounced." The appeal was taken 27 days after the entry of judgment, but the clerk had failed to discharge his duty, under F. R. Civ. Proc. 77(d),[3] to send notice of the entry to the losing party. Thereafter the district judge vacated the judgment and entered a new one, from which an appeal was taken the next day. The Supreme Court held that "it was competent for the trial judge, in the view that petitioner relied upon the provisions of Rule 77(d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to enter a new judgment. * * * The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause." A vigorous dissent emphasized that the public has an interest in having "a definite and ascertainable point of time when litigation shall be at an end unless within that time application for appeal has been made"; that "that purpose is defeated if judges may enlarge the time for appeal beyond the period prescribed by law"; and that "for that reason * * * this Court has consistently ruled

[3] Rule 77(d) did not then contain what is now its final sentence. See note 4 *infra*.

that no federal judge or court possesses the power to extend the time for appeal beyond the statutory period by any form of judicial action which falls short of a reconsideration of the provisions of a judgment in point of substance so as to postpone its finality." The 1946 amendment to Rule 73(a) sought to satisfy both the majority and the minority positions in *Hill* v. *Hawes*. In the situation presented in that case, "excusable neglect based on a failure of a party to learn of the entry of the judgment", the Rule permitted the district court to extend the thirty-day period for not longer than another thirty days; but there was to be no exception for "excusable neglect" generally, as there was in Rule 60(b)(1), on which the *Hill* majority had to some extent relied, 320 U. S. at 524, 64 S. Ct. at 336. See the Committee Note, quoted in 7 Moore, *supra*, at 3111-12.[1] In conformity with this background, and the language itself, we have heretofore given a rather strict reading to the "excusable neglect" clause of Rule 73(a), *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81 (2 Cir. 1960); such a reading would lead to the granting of both motions here, since appellant's failure to appeal within thirty days was not literally "based on a failure * * * to learn of the entry of the judgment."

A somewhat different approach seems to be dictated by the recent per curiam decision in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 83 S. Ct. 283, 9 L. Ed. 2d 261, which the briefs and arguments of the parties have not mentioned. There an attorney who admittedly had notice of the entry of the judgment sought and obtained from the district court, within the thirty-day period, a two-week extension to enable him to discuss whether to appeal with his client's general counsel, who was then away. Notice

[1] At the same time Rule 77(d) was amended by adding what is now the final sentence: "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a)." See the Committee Note, quoted in 7 Moore, *supra*, at 4003-04.

of appeal was filed within the period as so extended. The Seventh Circuit dismissed the appeal as untimely, on the ground that there was no showing of "a failure • • • to learn of the entry of the judgment" so as to authorize the district court to grant the extension. 303 F. 2d 609 (1962). The Supreme Court reversed, saying:

> "In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling."

Although the instant case does not present the precise situation of hardship found in *Harris*, where the extension was granted at a time when a timely appeal could still have been taken, there are enough elements of resemblance and a sufficient "showing of unique circumstances" that we feel constrained to follow the Supreme Court's lead. See also *Foman* v. *Davis*, 368 U. S. 951, 82 S. Ct. 396, 7 L. Ed. 2d 385 (1962). From the notification in the Clerk's postcard that the judgment had been "amended," and from the telephone information that the amendment consisted of dropping the individual defendants, appellant's attorney—whose prompt effort actually to inspect the amendment had proved unavailing—could not unreasonably have concluded that the change had been made pursuant to Rule 59(e), which provides for a motion within ten days "to alter or amend the judgment" (even though that Rule requires a motion thereunder to be "served"), rather than pursuant to Rule 60(a), as the order in fact stated. A motion under Rule 59(e), unlike one under Rule 60(a), is one of those which, as

provided in Rule 73(a), starts the time for appeal running anew; and appellant did in fact file his first notice of appeal within thirty days of the order directing the amendment. It may well be, as Professor Moore intimates, Vol. 6 at 3878, that, despite the breadth of its language, Rule 59(e) was not meant to include alterations or amendments relating to mere clerical mistakes that are correctible under Rule 60(a), even when as here motion to that end is made within the ten-day period. Compare *Southern States Equipment Corp.* v. *USCO Power Equipment Corp.*, 209 F. 2d 111, 116-17 (5 Cir. 1953). However, as we understand the approach taken in *Harris*, it would be going too far to say that when a party has excusably failed to learn that amendment of a judgment, made at the behest of his opponent within the ten-day period permitted by Rule 59(e), was in fact pursuant to Rule 60(a), the district court lacks *power* to grant the relatively short extension of time which is all that Rule 73(a) allows. Indeed, such a situation seems a bit closer to the language of the Rule than what *Harris* held to be close enough.

Motion to dismiss first appeal granted; motion to dismiss second appeal denied.

Order Denying Motion to Dismiss Appeal of February 18, 1963.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of April, one thousand nine hundred and sixty-three.

Present:

Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

EDWARD LIEBERMAN,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant-Appellee.

A motion having been made herein by counsel for the appellee to dismiss the appeal filed on February 18, 1963 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED APRIL 29, 1963
A. DANIEL FUSARO, CLERK

Judgment Dismissing Appeal of January 25, 1963.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of April, one thousand nine hundred and sixty-three.

Present:

Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

EDWARD LIEBERMAN,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant-Appellee.

A motion having been made herein by counsel for the appellee to dismiss the appeal filed January 25, 1963 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED APRIL 29, 1963
A. DANIEL FUSARO, CLERK

Order Denying Petition for Rehearing, Dated April 29, 1963.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and sixty-three.

Present:

Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

EDWARD LIEBERMAN,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED APRIL 29, 1963
A. DANIEL FUSARO, CLERK

Denial of Petition for Rehearing in Banc, dated April 29, 1963.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

EDWARD LIEBERMAN,
Plaintiff-Respondent,

v.

GULF OIL CORPORATION,
Defendant-Petitioner.

PETITION FOR REHEARING IN BANC

KISSAM & HALPIN, NEW YORK, N. Y., for defendant-petitioner.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

29 APR 1963

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED APRIL 29, 1963
A. DANIEL FUSARO, CLERK

Order Denying Petition for Rehearing in Banc, Dated April 29, 1963.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and sixty-three.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. CHARLES E. CLARK,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. THURGOOD MARSHALL,
Circuit Judges.

EDWARD LIEBERMAN,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant-Appellee.

A petition for a rehearing in banc having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED APRIL 29, 1963
A. DANIEL FUSARO, CLERK

Affidavit of Leo T. Kissam, Sworn to February 8, 1963.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

EDWARD LIEBERMAN,
Plaintiff-Appellant,

against

GULF OIL CORPORATION,
Defendant-Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEO T. KISSAM, being duly sworn, deposes and says:

1. I am a member of the firm of Kissam & Halpin, attorneys for defendant-respondent herein. I make this affidavit in support of defendant-respondent's motion to dismiss the appeal herein for failure of plaintiff-appellant to take such appeal within the time prescribed by Rule 73(a) of the Federal Rules of Civil Procedure.

2. This action was tried in the United States District Court for the Southern District of New York before the Honorable Sidney Sugarman and a jury commencing on November 9, 1962. On December 18, 1962, the jury returned a verdict for the defendant. On December 19, 1962, judgment in favor of the defendant was entered in the civil docket of the Clerk of the United States District Court for the Southern District of New York and notice of the entry of such judgment was mailed to the attorneys for both parties.

3. The original complaint in this action named Gulf Oil Corporation, John Leivia and W. B. Edwards as defendants. By amended complaint filed March 30, 1961,

Affidavit of Leo T. Kissam, Sworn to February 8, 1963.

John Leivia and W. B. Edwards were dropped as defendants. However, the judgment filed on December 18, 1962 and entered on December 19, 1962 inadvertently included in the caption the names of these individuals as defendants while at the same time reciting that they had been dropped pursuant to the second amended complaint which was filed November 7, 1962. When these clerical errors were discovered, the judgment was amended on December 26, 1962 pursuant to Federal Rule of Civil Procedure 60(a) by striking the names of these two defendants from the caption and by striking the erroneous reference to the date on which they had been dropped from the action, thus conforming the judgment to the record. On December 27, 1962 this amendment was entered in the civil docket by the clerk.

4. A copy of the docket entries of December 18-19 and December 26-27, 1962 is annexed hereto and marked Exhibit A.

5. Rule 73(a) requires that an appeal from a district court to a court of appeals must be taken within 30 days from the entry of the judgment appealed from. The judgment appealed from here having been entered on December 19, 1962, plaintiff's time to appeal therefrom expired 30 days thereafter,—on January 18, 1963.

6. Plaintiff did not file his notice of appeal until January 25, 1963, which was 37 days after the judgment was entered on December 19, 1962, or seven days after plaintiff's time to appeal had expired. Plaintiff's appeal was, therefore, not timely filed and must be dismissed. The amendment of the clerical error in the judgment under Rule 60(a) of the Federal Rules did not affect the finality of the judgment entered on December 19, 1962, and hence did not extend plaintiff's time to appeal therefrom.

Affidavit of Leo T. Kissam, Sworn to February 8, 1963.

Wherefore, it is respectfully requested that plaintiff-appellant's appeal to this Court from the judgment entered in this action in the United States District Court for the Southern District of New York be in all respects dismissed.

Leo T. Kissam

Sworn to before me this 8th day of February, 1963.

Patricia A. Roberts
Patricia A. Roberts
Notary Public, State of New York
No. 31-8597250
Qualified in New York County
Commission Expires March 30, 1964

Exhibit A

Extracts from civil docket of Clerk of the United States District Court for the Southern District of New York.

Edward Lieberman v. *Gulf Oil Corporation*

Date		Date Order or Judgment Noted
Dec. 18-62	Filed Judgment. Adjudged: The deft Gulf Oil Corporation shall have judgment against the pltff Edward Lieberman.—Clerk. Mailed notice.	Ent. 12-19-62
	* * * * * *	
Dec. 26-62	Filed amended Judgment. Ordered: Pursuant to Federal Rule of Civil Procedure 60(a) that the judgment entered herein by the clerk on 12-18-62 be and it hereby is amended by striking from the caption of said judgment the names of John Leivia and W. B. Edward; and from the body of said judgment the words "the remaining defts having been dropped pursuant to the second amended complaint filed 11-7-62" —Sugarman, J. Mailed notice	Ent. 12-27-62

Affidavit of Leo T. Kissam, Sworn to February 25, 1963.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

EDWARD LIEBERMAN,

Plaintiff-Appellant,

against

GULF OIL CORPORATION,

Defendant-Respondent.

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.:

LEO T. KISSAM, being duly sworn, deposes and says:

1. I am a member of the firm of Kissam & Halpin, attorneys for defendant-respondent herein.

I make this affidavit in support of defendant-respondent's motion to dismiss the appeal herein, pursuant to a second notice of appeal filed February 18, 1963, on the ground that this notice was filed after the 30-day period permitted by Rule 73(a), pursuant to an order of the United States District Court for the Southern District of New York extending the time to appeal, which order was entered without jurisdiction.

2. A previous motion (which is also returnable on this Calendar) to dismiss this appeal pursuant to a prior notice of appeal filed on January 25, 1963, on the ground that it was not timely filed, was served on plaintiff-appellant on February 15, 1963. On the following day, February 16, 1963, plaintiff served an order to show cause on defendant returnable February 18, 1963, requesting an order extending plaintiff's time to appeal to February 18, 1963, upon

the basis of excusable neglect. This motion was granted on that day by the Honorable Sidney Sugarman, D. J., pursuant to which a second notice of appeal was filed by plaintiff on February 18, 1963.

Defendant now moves to dismiss the second notice of appeal on the grounds that it was not timely filed, and that the district court had no jurisdiction to extend the time for filing such notice.

3. Rule 73(a) of the Federal Rules of Civil Procedure requires that an appeal must be taken within 30 days from the date of entry of the judgment appealed from except that "upon a showing of excusable neglect based on a failure to learn of the entry of the judgment" the district court may extend the time to appeal for a period not exceeding an additional 30 days.

4. The judgment in this action was entered by the Clerk of the Court on December 19, 1962. Plaintiff's time to appeal therefrom accordingly expired 30 days thereafter, on January 18, 1963. Plaintiff, however, did not file his first notice of appeal until January 25, 1963, which was 37 days after the entry of judgment on December 19, 1962, and seven days after plaintiff's time to appeal had expired.

5. The filing of a notice of appeal within the time limited by 28 U. S. C. §2107 and FRCP 73(a) is mandatory and jurisdictional and cannot be enlarged by action of the court or of the parties except in accordance with the provisions of Rule 73(a), which allows the time to appeal to be extended for an additional 30-day period only in the event that plaintiff has failed, through excusable neglect, to learn of the entry of judgment.

6. In his application to the district court for an extension of his time to appeal, however, plaintiff made no claim of failure to learn of the entry of judgment. On the contrary, plaintiff's counsel in his affidavit in support of that

Affidavit of Leo T. Kissam, Sworn to February 25, 1963.

motion, sworn to February 15, 1963 (a copy of which is annexed hereto as Exhibit A), and again on his oral argument before Judge Sugarman on February 18, 1963, admitted that he was notified of the judgment when entered by post card mailed by the Clerk of the District Court.

Neither in his motion papers nor on his oral argument, did plaintiff's counsel make any attempt to justify his failure to appeal within the required time on the only basis on which an extension of time can be predicated,—namely, failure, through excusable neglect, to learn of the entry of judgment.

7. It is submitted, therefore, that the district court had no discretion in the matter, since it was beyond its jurisdiction to grant any extension of the time to appeal except in accordance with the mandatory provisions of Rule 73(a).

WHEREFORE, it is respectfully requested that plaintiff-appellant's appeal to this Court from the judgment entered in this action in the United States District Court for the Southern District of New York be in all respects dismissed.

LEO T. KISSAM.

Sworn to before me this 25th day of February, 1963.

MICHAEL W. GRANEY

MICHAEL W. GRANEY
Notary Public, State of New York
No. 31-1532965
Qualified in New York County
Commission Expires March 30, 1963

Exhibit A, Annexed to Affidavit of Leo T. Kissam, Sworn to February 25, 1963.

Affidavit of Bernard Tompkins, Sworn to February 15, 1963.

Civil Action No. 140-17

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EDWARD LIEBERMAN,

Plaintiff,

against

GULF OIL CORPORATION,

Defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BERNARD TOMPKINS, being duly sworn, deposes and says:

I am a member of the firm of Tompkins & Lauren, and trial counsel herein, and am fully familiar with the matters hereinafter set forth.

After trial before Honorable Sidney Sugarman, U. S. D. J., and a jury in this Court, a judgment on the jury's verdict in favor of the defendant was entered by the clerk of the court on December 19, 1962. Notice thereof was received by your deponent by postcard from the said clerk of the court. Thereafter, on December 26, 1962, Judge Sugarman amended the judgment on his own motion at the request of the clerk of the Court and said amended judgment was entered by the clerk of the court on December 27, 1962, and a postcard notice of said amended judgment was subsequently received by your deponent.

Exhibit A, Annexed to Affidavit of Leo T. Kissam, Sworn to February 25, 1963.

On January 25, 1963, a notice of appeal to the Court of Appeals, in proper form from the said amended judgment, was served on the attorneys for the defendant, which was within the 30-day period prescribed by Rule 73(a) of the Federal Rules of Civil Procedure. Said notice of appeal was duly filed in this Court, together with a cost bond required on said appeal and filing fee paid.

Today, February 15, 1963, your deponent was served with a notice of motion made by the defendant in the Court of Appeals to dismiss the said appeal, as not being timely on the theory that plaintiff's notice of appeal should have been filed within thirty days from the entry of the original unamended judgment.

Your deponent firmly believes that plaintiff's appeal is timely taken, and defendant's motion to dismiss should be denied. However, this application is made because the return date of the motion in the Court of Appeals is beyond the last day within which this Court may extend the time to appeal pursuant to Rule 73(a). Consequently, if the Court of Appeals for any reason should rule against the plaintiff, he will have been deprived of a right to appeal because of the inadvertence or oversight of his counsel.

It is respectfully submitted that the plaintiff should not suffer for such oversight or inadvertence if there was one, and should be given his day in Court to protect his appeal. In your deponent's opinion, there is substantial merit to the appeal, and there are questions of law which should be passed on by the appellate court.

Exhibit A, Annexed to Affidavit of Leo T. Kissam, Sworn to February 25, 1963.

In view of the shortness of time remaining in which this Court may grant an extension of time (under Rule 73(a) the last day to make such an order will be February 18, 1963), it is respectfully requested that the annexed order to show cause be granted. No previous application has been made to any Court or judge thereof for the relief sought herein.

BERNARD TOMPKINS /s

BERNARD TOMPKINS

Sworn to before me this 15th day of February, 1963

ESTELLE F. REAL
Notary Public, State of New York
No. 24-8509750
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1964

Affidavit of Bernard Tompkins, Sworn to March 9, 1963.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

EDWARD LIEBERMAN,
Plaintiff-Appellant,

against

GULF OIL CORPORATION,
Defendant-Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BERNARD TOMPKINS, being duly sworn, deposes and says:

I am a member of the firm of Tompkins & Lauren, and was trial counsel in the Court below, and am fully familiar with the matters hereinafter set forth:

After a trial before Hon. Sidney Sugarman, U. S. D. J. and a jury, a judgment was entered by the Clerk of the District Court on December 19, 1962. Notice thereof was received by your deponent by a postcard from the said clerk. Copy of the postcard is annexed hereto, and marked Exhibit "1".

Thereafter on December 28th, your deponent received another postcard from the Clerk of the District Court reading: "There was entered on the docket 12-26-62 an order and judgment amended." Copy of that postcard is annexed hereto, and marked Exhibit "2".

That same day, upon receipt of the second postcard, your deponent personally went to the Clerk's office to examine the original judgment to learn in what respect it had been amended. At that time the amended judgment was not yet in the file. Due to the New Year's weekend, it

was not possible to get any information until Wednesday, January 2, 1963. Then, a telephone inquiry to the Clerk brought the information that the original judgment had included therein, as defendants, two persons named in the original complaint who were dropped in the amended complaint, and Judge Sugarman's new order amended the judgment by striking those names.

Your deponent concluded that since the original order designated as the "judgment" had been superseded by the amended judgment, an appeal to be taken would have to be from the last and final order. Thereupon a notice of appeal and cost bond in proper form from the said amended judgment was duly served on the attorneys for the defendant, and timely filed in the District Court on January 25, 1963, within the thirty-day period prescribed by Rule 73(a) of the Rules of Federal Practice.

Thereafter on February 15, 1963, your deponent was served with a notice of motion made by defendant in this Court, returnable March 4, 1963, to dismiss the appeal, as being not timely on the theory that plaintiff's notice of appeal should have been from the original unamended judgment; and thus, more than thirty days had elapsed from the entry of that "judgment".

Then, on re-checking the occurrence which led to the amendment of the judgment, your deponent learned that Judge Sugarman's order was based on the application of the Respondent, conveyed to the judge by the Clerk of the District, to strike from the judgment the names of the two co-defendants referred to above, who were named in the original complaint.

Although your deponent then believed that he followed proper procedure in appealing from the amended judgment, rather than the superseded order, he decided that rather than have his client's appeal jeopardized, he would apply for an extension of time so as to enable him to appeal from the original order, as well. Accordingly on that same day, February 15th, he secured an order to show cause to bring

Affidavit of Bernard Tompkins, Sworn to March 9, 1963.

on a motion before the trial judge to extend the time to file such notice of appeal on the basis of excusable neglect, setting forth the above facts. After hearing argument, Judge Sugarman granted the motion on February 18th and on the same day, and within the sixty-day period allowed by Rule 73(a), another notice of appeal; that is, from the original judgment was duly filed.

In your deponent's opinion, there is substantial merit to the appeal including important questions of law, which should be passed on by this Court.

WHEREFORE, your deponent submits that his action in appealing from the amended judgment of December 26, 1962 was proper and timely, and the motion to dismiss the appeal on that ground should be denied. However, in the event this Court holds that the appeal should be from the original judgment entered December 19, 1962, then it is submitted that the extension granted by Judge Sugarman was legal and proper, and the notice of appeal filed on February 18th was timely, and the motion to dismiss on that ground should be denied.

BERNARD TOMPKINS

BERNARD TOMPKINS

Sworn to before me this 9th day of March, 1963.

MARGARET T. HARRIS

MARGARET T. HARRIS
Notary Public
Qualified in New York County
No. 1686630
Commission Expires March 30, 1965

Exhibit 1, Annexed to Affidavit of Bernard Tompkins, Sworn to March 9, 1963.

Postcard.

CLERK'S OFFICE

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

EDWARD LIEBERMAN *vs.* GULF OIL CORP. ET AL	Civil Action No. 140-17

There was entered on the docket 12-18-62, an order & (judgment)

HERBERT A. CHARLSON,
Clerk.

Exhibit 2, Annexed to Affidavit of Bernard Tompkins, Sworn to March 9, 1963.

Postcard.

CLERK'S OFFICE

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

EDWARD LIEBERMAN

vs.

GULF OIL CORP.

Civil Action No. 140-17

There was entered on the docket 12-26-62 an order & (judgment) amended.

HERBERT A. CHARLSON,
Clerk.

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Office-Supreme Court, U.S
FILED
AUG 3 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 228

GULF OIL CORPORATION,

Petitioner,

v.

EDWARD LIEBERMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TOMPKINS & LAUREN,
Attorneys for Respondent,
165 Broadway,
New York 6, New York.

BERNARD TOMPKINS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 228

GULF OIL CORPORATION,
Petitioner,

EDWARD LIEBERMAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 2, 1963 (R. 9a),* which denied petitioner's motion to dismiss an appeal filed by respondent herein from a judgment in the United States District Court for the Southern District of New York, rendered after a jury trial. Petitioner's application for a rehearing en banc by all the Judges of the Second Circuit was denied on April 29, 1963 (R. 13a).

* References are to pages of the printed record.

Question Presented

Was the Court of Appeals, on the facts of this particular case, required under Rule 73(a) of the Federal Rules of Civil Procedure to dismiss an appeal as untimely filed, where the District Court had granted an extension of time within the statutory period on the basis of excusable neglect?

Statute Involved

Rule 73(a) of the Federal Rules of Civil Procedure is the Rule involved. The Rule, so far as relevant, reads:

> "(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law. * * * except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: * * * granting or denying a motion under Rule 59 to alter or amend the judgment: * * *."

Statement of the Case

Respondent herein was plaintiff in a suit in the United States District Court for the Southern District of New

York, charging petitioner Gulf Oil Corporation with malicious prosecution. After a lengthy trial before Hon. Sidney Sugarman, U.S.D.J. and a jury, a verdict was rendered in favor of defendant Gulf (R. 2a). On December 19, 1962, an order and judgment on the jury's verdict was entered by the Clerk of the District Court, and a postcard notification was sent to the attorney for the plaintiff, the respondent herein (R. 2a).

Subsequently on December 28, 1962, respondent's attorney received another postcard from the Clerk of the District Court reading: "There was entered on the docket 12-26-62 an order and judgment amended" (Exhibit "2", R. 27a). (The word "amended" and the date were typewritten; the rest was a printed form). There was nothing on the card which was received within the ten-day applicable period, to indicate that the amendment was not under Rule 59(e), which would make the time to appeal therefrom thirty days from the entry of such amended judgment. On receipt of the postcard, Lieberman's attorney personally went to the clerk's office to learn in what respect it had been amended. He was unsuccessful because the order was not yet in the file (R. 23a). Due to the New Year's weekend, he could not get any information until Wednesday, January 2, 1963. He then learned on his telephone inquiry that the amendment was to eliminate from the original judgment the names of two co-defendants, William B. Edwards and John Leivia, who were in the original complaint, but not in the amended complaint on which the case was tried. The inclusion of names in a judgment of persons who were not parties to the litigation could be a matter of substance and not a mere clerical error; *e.g., Hardware Mutual Casualty Co. v. Schantz*, 186 F.(2) 968, 972 (7th Cir. 1951).

Thereupon, respondent Lieberman filed a notice of appeal from said amended judgment within thirty days, to wit, on January 25, 1963.

Subsequently on February 15, 1963, appellant Gulf served a notice of motion in the Court of Appeals to dismiss the appeal on the ground that the notice of appeal was not filed within thirty days from the original judgment. Then, on re-checking the clerk's file, respondent's attorney learned for the first time how the amendment came about; that is, it had been signed by the judge on the application of appellant Gulf, and that it was made under Rule 60(a), and not 59(e).

Thereupon on the same day, February 15th, the attorney applied by order to show cause to the trial judge who had signed the amended judgment for an extension of time on the basis of "excusable neglect", caused by the misleading notice from the clerk, to enable him to file a new notice of appeal from the original judgment. After oral argument, that motion was granted on February 18, 1963 and on the same day, within the extended time permitted by Rule 73(a), such notice of appeal was duly filed.

Appellant Gulf, having moved to dismiss the first notice of appeal as untimely, also moved to dismiss the second appeal on the ground that the trial judge had no authority to extend respondent's time. The Court of Appeals granted the motion to dismiss the first appeal, but denied the dismissal of the second. The unanimous opinion of the Court is reported at 315 F. 2d 403, and is printed in the Record herein, pages 1a-8a.

Argument

The sound reasoning supporting the decision of the Court of Appeals in the instant case is so well and com-

pletely set forth in its unanimous opinion as not to require additional, extended discussion in this memorandum. However, in answer to petitioner's specific points, particularly in its framing of the "question presented" (R. 2), it may be emphasized that the Court below did not put in issue the question of whether *Harris Trucklines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, "*compels*" a Court of Appeals to affirm an extension of time to appeal granted by a district court, where there has not been the showing of excusable neglect required by Rule 73(a). This is a manufactured, straw issue.

Rather the issue is, as expressed in this memorandum (p. *ante*) "Was the Court of Appeals, on the facts of this particular case, required under Rule 73(a) of the Federal Rules of Civil Procedure to dismiss an appeal as untimely filed, where the District Court had granted an extension of time within the statutory period on the basis of excusable neglect?" The fact that the granting of an extension by the District Court must be based on "unique circumstances" is clear, for in upholding the discretion of the District Court in the case at bar, the Court of Appeals itself concluded that the unique circumstances present were even "a bit closer to the Rule than what *Harris* held to be close enough" (R. 84).

There is no real conflict between the Circuits on this issue as suggested by petitioner, and the cases cited in its "Reasons for Granting the Writ" do not support its contention. All are distinguishable on the facts. None have the unique circumstances present in *Harris*, or the case at bar.

Watson v. *Providence Washington Ins. Co.*, 291 F. 2d 736 (4th Cir., 1963), involved a case brought as an action at law. A notice of appeal was filed after the statutory

period. Appellant sought to justify his default on the ground that the action might have been brought in admiralty, where the notice would have been timely. No question of the propriety of an extension was involved.

Howard v. *Local 74, Wood, Wire and Metal Lathers International*, 208 F. 2d 1930 (7th Cir., 1953), was the case principally relied on in the Seventh Circuit's dismissal of the appeal in the *Harris* case (see 303 F. 2d 609, 611), which decision was reversed by this Court (371 U. S. 215). In *Howard* it was conceded that there was no misunderstanding about the notice of entry of judgment received by the attorneys for appellants. Therefore, the Court of Appeals rejected as specious the excuse that all of the numerous persons who might be termed plaintiffs in the class action had not been notified of the judgment. In addition, the Appellate Court found as a fact that the District Court had granted the extension "automatically", without considering whether there had actually been excusable neglect.

Knowles v. *U. S.*, 260 F. 2d 852 (5th Cir., 1958), is one of the cases specifically considered by this Court in its *Harris* decision. In that case, the notice of appeal was simply untimely filed, without any unique circumstances such as involved in either *Harris*, or the case at bar.

In *Edwards* v. *Doctor's Hospital*, 242 F. 2d 888 (2 Cir., 1957), the dismissal was based on the fact that final judgment was entered on March 26th, and the District Court's order, extending the time, was not made until May 31st, at least five days after the 60-day extended limit (242 F. 2d 888 at pp. 890-1). Again, there were no unique circumstances.

In *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81 (2 Cir., 1960), the Court of Appeals simply held that the district

Judge was not "beyond the bounds of proper discretion" in denying an extension of time.

No one, and certainly not the Second Circuit Court, suggests that the limitation in Rule 73(a) has lost any of its vitality, or that the floodgates are now open to general exceptions. Any misunderstanding on that subject should be removed by *Wagner* v. *U. S.*, 316 F. 2d 871, decided by the same Court in April, 1963, subsequent to the case at bar. In *Wagner*, the Court said:

> "* * * as explained in our recent opinion in Lieberman *v.* Gulf Oil Corp., 315 F. 2d 403 (2 Cir. 1963), the purpose of the 1946 amendments of Rule 73(a) and 77(d) was to substitute for the open-ended possibilities suggested by that decision [Hill *v.* Hawes, 320 U. S. 520] *the strictly limited relief* now authorized by Rule 73(a)." (Emphasis added.)

That the decision now under consideration is in line with the spirit, as well as the precise language, of this Court in *Harris*, is evident from the opinion of the Court, by Mr. Justice Goldberg, in *Foman* v. *Davis*, 371 U. S. 178; decided in the same month as *Harris* (Dec., 1962), where the following was said:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Conley *v.* Gibson, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1."

In the same vein, the Fifth Circuit in *Blanchard* v. *Commonwealth Oil Company*, 294 F. 2d 834 (1961) had earlier observed:

> "The Federal Rules are not intended to create procedural traps for the parties, forcing them to file premature appeals whenever some slight doubt arises as to the propriety of the court's way of entering judgment."

CONCLUSION

The petition should be denied.

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Respectfully submitted,

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